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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. [redacted] 121

ZEB MATTOX,
Petitioner,

versus

CHARLES C. HERTWIG, Trustee for Precision Recapping Equipment Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner, Zeb Mattox, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 4, 1963.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported in the Federal Reporter, but appears in the transcript of the record at pages 130-138. A copy of said opinion is appended to this petition at page 17.

The District Judge did not file an opinion.

JURISDICTION.

The opinion of the Court of Appeals was filed on April 4, 1963, and judgment was entered on the same date. There has been no motion for or order respecting a rehearing. An order staying the mandate of the Circuit Court for a period of twenty days from April 24, 1963, has been entered.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and c. 541, Sec. 24, 30 Stat. 553; 11. U. S. C. 47 (c).

QUESTIONS PRESENTED.

The basic, vital question in this case is whether a Judge of one District Court in which is pending a Chapter X reorganization may compel a resident of another district, residing more than one hundred miles from the place of hearing, to appear and show cause before him why the witness should not be required to testify and produce records concerning a partnership of which he is a member.

Secondly, does a stockholder, director, and officer of such corporation become subject to service by mail or by service upon his attorney of such an application because he, as a stockholder, filed and later withdrew objections to

the reorganization petition, by reason of the partnership of which he is a member having stipulated in open court that two contracts between the partnership and the corporation may be cancelled or because the partnership filed its claim of indebtedness against the corporation with the trustee?

Lastly, may a Judge of one district direct the Clerk of another district to issue a subpoena duces tecum to a resident of the latter's district?

THE STATUTES INVOLVED.

The questions presented involve the following statutes:

"The trustee upon his appointment and qualification—

"(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor . . .;"

"(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them; . . ."

c. 575, Sec. 1, 52 Stat. 890; 11 U. S. C. 567.

"(a) The bankrupt shall . . . (10) at the first meeting of his creditors, . . . and at such other times as the court shall order, submit to the examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, . . . and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; . . ."

"(b) Where the bankrupt is a corporation, its officers, the members of its board of directors . . . its

stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title. . . ."

c. 579, Sec. 4, 66 Stat. 422, 11 U. S. C. 25.

"(a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of the bankrupt: . . ."

"(b) Except as herein otherwise provided, the right to take depositions in proceedings under this title shall be determined and enjoyed according to the laws of the United States now in force, or such as may be hereafter enacted, relating to the taking of depositions."

"(c) Notice of the taking of depositions shall be filed with the court and a copy of such notice shall be served upon the adverse party in every case."

"(k) In all proceedings under this title, the parties in interest shall be entitled to all rights and remedies granted by the Rules of Civil Procedure for the United States District Courts established from time to time by the Supreme Court pertaining to discovery, interrogatories, inspection and production of documents, and to the admission of execution and genuineness of instruments; . . ."

c. 575, Sec. 1 (21), 52 Stat. 852, 11 U. S. C. 44.

"Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the

deposition is to be taken of subpoenas for the persons named or described therein. . . ."

"At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. . . ."

"Failure by any person without adequate excuse to obey a subpoena served upon it may be deemed a contempt of the court from which the subpoena issued."

Rule 45 (d), (e), (f), Federal Rules of Civil Procedure.

STATEMENT OF CASE.

The Precision Recapping Equipment Company, a corporation having its principal office in Bibb County within the Middle District of Georgia, filed its petition for reorganization under Chapter X of the Bankruptcy Act.

Charles C. Hertwig was appointed trustee.

The stockholders of Precision were C. O. Dennis, owning forty shares; Zeb Mattox, forty shares; Charles M. Cork, ten shares; and Earl Propst, ten shares. These four constituted the Board of Directors. The officers were C. O. Dennis, president; Zeb Mattox, vice president; and H. E. Fourcher, secretary-treasurer.

Mattox and Propst lived in Charlotte, North Carolina and the others resided in Macon, Georgia.

Zeb Mattox, as a stockholder of Precision, filed, but later withdrew, written objections to the reorganization petition. These objections were filed by his attorneys, W. M. Nicholson of Charlotte, North Carolina and Cubbedge Snow of Macon, Georgia.

Zeb Mattox and his four sons all residing in Charlotte, North Carolina, constitute a partnership known as Retreading Equipment Company, having its place of business in Charlotte, North Carolina.

Precision Recapping Equipment Company held patents for the manufacture of tire molds. The Den-Nap Electric Mold Company of Macon was a licensee under these patents. Retreading Equipment Company was likewise a licensee paying a royalty on molds manufactured by it.

Precision Recapping Equipment Company was sales agent for Den-Nap Electric Mold Company and Retreading Equipment Company had a sales contract with Precision Recapping Equipment Company to sell on commission products of Den-Nap Electric Mold Company. Under the royalty and sales contracts Retreading agreed to make detailed monthly reports and to pay promptly at the end of each month all sums due. The trustee, upon his appointment, continued in force these contracts with Retreading.

Prior to the application involved in this controversy the trustee applied to the court for authority to cancel the contracts claiming that Retreading was in default in the monthly payments. In the same application he sought to recover a judgment against Retreading for the amount alleged to be due, which application was served in the same

manner as the application now before the court. Retreading appeared through its attorney, Cubbedge Snow, of Macon, Georgia, and set up that the court had no jurisdiction over it but that it had no objection to the cancellation of the contracts. The attorney for the trustee announced in open court that no recovery could be had in that proceeding and the court authorized the cancellation of the contracts without prejudice to the rights of either party.

The Retreading Equipment Company had, prior to the application now before the court, filed its claim of indebtedness against Precision in the sum of approximately $1,100,000.00 through its attorney, Cubbedge Snow of Macon, Georgia.

Subsequent to the cancellation of the contracts the trustee filed the present application with the Judge of the Middle District of Georgia for a subpoena duces tecum to Zeb Mattox seeking the production of the books and records of **Retreading Equipment Company** and requesting that Mattox be required to show cause before the Judge why said subpoena duces tecum should not be issued. The application and show cause order were served on Mattox by mail and upon his attorney in Macon, Georgia.

Petitioner moved to quash the service of the application and show cause order on the ground that he resided without the district and more than one hundred miles from the place of hearing and that there was no authority for the service upon him by serving his attorney who represented him in other matters pending before the court. He further plead that the court was without jurisdiction to order a subpoena duces tecum to him. The trial court overruled the motion to quash and directed that the Clerk of the Western District of North Carolina issue the subpoena duces tecum as prayed for with minor modifications.

The Circuit Court of Appeals disposed of the appeal in this fashion:

> "We think it plain that under the circumstances the appellant was such a party to the pending proceedings in the reorganization court that he was subject to any orders of the court as would run against any party to the litigation. We also think that the provisions of the Federal Rules of Civil Procedure which authorize the taking of a deposition outside of the territorial jurisdiction of the court in which the litigation is pending and the rules providing for the method of service of the notice of taking such deposition and the issuance of a subpoena duces tecum under such circumstances are applicable in a situation such as that before the court.
>
> "The Court followed the procedure as suggested in Collier on Bankruptcy, 14th Edition, Volume 2, pages 330-331, which seems to us to comport fully with the law and the rules."

REASONS FOR ALLOWANCE OF THE WRIT.

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

The decision of the Fifth Circuit Court of Appeals in this case is in conflict with the decision of the Ninth Circuit Court of Appeals in the case of **Sullivan v. Dickson, etc.**, 283 F. 2d 725 (1).

The decision of the Court of Appeals has written out of the law Sec. 2 (20), 11 U. S. C. 11, providing that district courts may exercise ancillary jurisdiction over persons within their respective territorial limits in aid of a

trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

The decision of the Court of Appeals sanctions the hailing of prospective witnesses from distant states to the local district to answer applications to take their testimony, contrary to long established principles for the protection of witnesses.

Ordering a witness residing in North Carolina to show cause in Macon, Georgia, why he should not be compelled to produce his partnership's records in Charlotte, North Carolina, is just as illegal an invasion of his jurisdictional rights as ordering him to produce the records in Macon.

The Rules of Civil Procedure do not apply in every aspect to proceedings under the Bankruptcy Act. General Order 37 of this Court makes that manifest.

Circuit Judge Maris in **In Re Standard Gas and Electric Company**, 54 F. Supp. 752, held that Sec. 21 (a) of the Bankruptcy Act authorizing the court to summons officers of the corporation regardless of the distance from the place of hearing, provided only that their fees were tendered, overrides and supersedes 45 (e) of the Rules of Civil Procedure since General Order 37 made the rules applicable only where they were not inconsistent with the Bankruptcy Act.

Rule 1 declares "These rules govern the procedure . . . in all suits of a civil nature. . . ." They do not apply to an exploratory discovery examination of the witness where no suit is pending.

The Bankruptcy Act contemplates and makes provision for such an exploratory examination, but not the Federal Rules of Civil Procedure.

The holding of the Court of Appeals that the provisions of the Federal Rules of Civil Procedure authorize the procedure adopted in this case is in direct conflict with the decision of the Ninth Circuit in the case of **Sullivan v. Dickson, etc.**, 283 F. 2d 725 (1) in which that court held:

> "There is no mechanism in federal civil procedure by which inspection of documents can be granted in the absence of a pending proceeding."

There was no necessity—no excuse—for the procedure adopted by the trustee in this case. Sections 21 (a) and 2 (20) of the Bankruptcy Act afford the trustee in bankruptcy a plain and adequate remedy for an inquisitorial examination of witnesses to ascertain the existence of assets of a bankrupt where a suit is not pending.

> "The court may, upon application of any officer, bankrupt or creditor, by order require any designated persons . . . to appear before the court . . . to be examined concerning the acts, conduct, or property of the bankrupt. . . ."
>
> Chapter 541, Sec. 21, 30 Stat. 552, 11 U. S. C. 44 (a).

What court?

> "The courts of the United States . . . are invested . . . with . . . jurisdiction . . . to . . . (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of their receiver or trustee afforded in any bankruptcy proceedings pending in any other court of bankruptcy . . ."
>
> Chapter 541, Sec. 2, 30 Stat. 545, 11 U. S. C. 11.

> "A federal district court has jurisdiction to grant an order for the examination of witnesses who are residents of the district, on the application of a trustee

in bankruptcy, **appointed in proceedings in bankruptcy pending in another district.**" (Emphasis ours.)

In Re Elkus, 216 U. S. 115, 54 L. Ed. 407.

"Bankruptcy Act . . . Section 21 (a) . . . provides that a court of bankruptcy may on application require any designated person who is a competent witness . . . to appear in Court . . . to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in the process of administration under the act. Held that, where it was sought to examine a resident of another state in support of creditors' specifications of objection to a bankrupt's discharge, application for an order requiring the witness to appear before a referee in bankruptcy and submit to examination **should be made to the Federal District Court of the district wherein the witness resided.**" (Emphasis ours.)

In Re Robinson (D. C. Minn.), 179 F. 724 (1).

The Judge of the Middle District of Georgia was totally without authority to assume jurisdiction over petitioner, the application showing on its face that petitioner was a resident of North Carolina. The fact that petitioner resided in North Carolina, a distance of only 350 miles from Macon, Georgia, gave the court no more jurisdiction over him than if he had lived in Hawaii or Alaska.

To be sure, the Bankruptcy Act authorizes the court to require the attendance of the officers of the corporations, regardless of their residence for examination, provided that fees are tendered if they live more than 100 miles from the place of hearing, but that provision has no relevancy in this case.

Here, obviously, petitioner was not summonsed as an officer of the reorganizing corporation. Indeed, the ap

plication itself plainly discloses that he was to be examined only in connection with the affairs of Retreading Equipment Company. Further proof that he was not so summonsed is the fact that his fees were not tendered as required by Sec. 21 (a).

Jurisdiction over petitioner is not claimed by reason of his having been found in the Middle District of Georgia. (See **In Re Youroveta Home and Foreign Trade Co., Inc.**, 288 F. 507 (2) (2 C. C. A.))

There is no provision, by statute, or rule, which authorizes the bankruptcy court to assume jurisdiction over a person, other than the bankrupt or a party, by service by mail on such person or by service upon such person's attorney.

By what legerdemain can it be urged that petitioner was a party to this application? As a stockholder he had exercised his right to file objections to the reorganization petition. But that is not related to the present application in anywise. Furthermore, it was ended by petitioner's withdrawal of his objections.

But, it is said that Mattox and his partners appeared in court in answer to a previous show cause order relating to the cancellation of the contracts which application and show cause order was served upon Mattox by mail and upon his attorney in Macon. Petitioner, in that proceedings plainly notified the court that he did not admit the court's jurisdiction over him. True, he and Retreading consented to cancellation of contracts but the trustee withdrew his action to recover the indebtedness alleged to be due.

Retreading Equipment Company likewise has filed its claim of more than a million dollars based on a note given

by Precision to petitioner and by petitioner transferred to the partnership, but manifestly this application doesn't relate to objections, if any, filed by the trustee to the allowance of this claim. If that had been the case, it would have been a simple matter to have served the partnership with notice to produce pertinent books and records for examination. Plainly what the trustee sought was an exploratory examination of petitioner to learn the business operation of Retreading Equipment Company with whom the trustee was now in direct competition and the names of Retreading's customers.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies."

1 Greenl. Ev., par. 535, quoted approvingly in the case of **Green v. Bogue**, 158 U. S. 478, p. 505, 39 L. Ed. 1061, p. 1070.

"The terms 'party (or parties) to the action' and 'party (or parties) to the cause' are used to designate the person or persons who are seeking to establish a right and the person or persons on whom it is sought to impose a corresponding duty or liability; those actually interested as determined from the facts of the case, in the subject matter of the litigation, as appears on the record; and who, as discussed supra subdivision a of this section, have the right to control the proceedings, make a defense or appeal from the judgment."

67 C. J. S., Parties, Sec. 1 I b (1), p. 887

In the case of **Carpenter v. Kane, etc.**, 251 F. 2d 20 (DCCCA), the court held that where a nonresident filed petition for appointment of a conservator which was done,

the court could not two years later entertain a motion by the conservator to require the nonresident plaintiff to turn over to him certain funds allegedly belonging to the person for whom the conservator was appointed by serving the motion upon the attorney who appeared for the conservator.

"Only where an attorney is expressly or impliedly authorized to accept service of process can his doing so bind his absent client and subject him to personal jurisdiction of the local court."

Christensson v. [illegible]gdal, 199 F. 2d 402 (1) (DC-CCA).

"Although there appears to be some difference of opinion as to whether an employment to defend of itself gives the attorney authority to act in this respect, it is well settled that, before the attorney has appeared as attorney of record and jurisdiction has been acquired over his client, the attorney has no power to receive, accept, or waive the original process or notice by which personal jurisdiction is acquired, unless he has in some manner been sufficiently authorized to do so. . . ."

Attorney and Client, 7 C. J. S., Sec. 83, p. 905.

"Although a Rule of Civil Procedure permits the service of an amended complaint upon counsel, such rule does not authorize such service where amended complaint contains an entirely different cause of action which could not have been properly served originally by the method used in serving the original complaint."

Lasch v. Antkies et al., 161 F. Supp. 851 (4).

CONCLUSION.

In the lower court the trustee requested the court to direct that petitioner could not apply for relief to the Western District of North Carolina. The very request indicates the fallibility of this procedure.

Even in a non-bankruptcy case it has been held that the court of a district which issued the subpoena duces tecum has jurisdiction to modify it.

> "'. . . Rule 45 (b) states the court 'upon motion . . . may (1) quash or modify the subpoena if it is unreasonable and oppressive . . .' . . . To place a construction upon Rule 45 (b) that would require one who is not a party, and who seeks modification of a subpoena served in connection with an action pending in a distant court, to make application before that court, instead of in the court for the district in which the deposition is being taken, would not effectuate the purpose of the Federal Rules which were designed 'to secure the just, speedy, and inexpensive determination of every action'. . . ."
>
> **Shawmut, Inc. v. American Viscose Corp.** (D. C. N. Y.), 11 F. R. D. 562 (3), p. 565.

> "The same principles governing the immunity of *nonresident parties, witnesses, attorneys and other* persons apply 'whether the service of process is in the form of a summons or in the form of a subpoena,' **and the tendency has been to enlarge rather than to diminish the privilege**" (Emphasis ours).
>
> Moore's Federal Practice, Vol. 5, pp. 1727-8, Sec. 45.06 (2).

Plainly the decision of the Fifth Circuit Court is a step backwards. If allowed to stand it is bound to work severe hardships upon witnesses.

Respectfully submitted,

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OPINION.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 19,948.

Zeb Mattox,

Appellant,

versus

Charles C. Hertwig, Trustee for Precision Recapping Equipment Company,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(April 4, 1963.)

Before Tuttle, Chief Judge, Pope* and Jones, Circuit Judges.

Tuttle, Chief Judge: This is an appeal from an order of the District Court for the Middle District of Georgia directing that a subpoena duces tecum be issued requiring appellant to appear in Charlotte, North Carolina, on a specified date with described records of a partnership of which he was a partner and to give testimony touching on financial transactions between his partnership and Precision Recapping Equipment Company, which was then in recor-

* Of the Ninth Circuit, sitting by designation.

ganization under Section 10 of the Bankruptcy Act. The appeal also complains of the order of the trial court denying the motion to quash the show cause order following which the subpoena duces tecum was ordered.

The question presented is whether the Bankruptcy Court in the Middle District of Georgia under the circumstances existing had the legal power to cause a subpoena duces tecum to be issued and served on a non-resident of the State of Georgia, residing some three hundred fifty miles distance to produce records under his control for the examination of the Trustee in reorganization. In issuing its orders, the trial court considered that the appellant was a party to the reorganization proceedings, and thus subject to the orders of the Court in the same manner as any other party.

The appellee contends that Section 21 (b) of the Bankruptcy Act and Section 21 (k) of the Act, expressly provides that the party that enters shall be entitled to all the rights and remedies pertaining to discovery, interrogatories, inspection and production of documents as are granted by the Rules of Civil Procedure for the United States District Courts; that the action taken by the District Court here is strictly in accordance with the provisions of Rule 26 touching on the taking of depositions and Rule 45, dealing with the issuance of a subpoena to enforce attendance in the county in which the witness resides. The order issued by the District Court in this case provided for notice to be served by the United States Mail and for service to be made on counsel of record in the pending reorganization proceedings who had previously appeared on behalf of appellant and on behalf of his partnership, Retreading Equipment Company.

Appellant, on the other hand, contends that the provisions of the Bankruptcy Act which authorize the holding

of ancillary hearings in bankruptcy matters (Section 2 (20) of the Bankruptcy Act) exclude the proceedings in a Bankruptcy Court from those cases which otherwise would fall within the broad powers contained in the Federal Rules of Civil Procedure. . . .

The circumstances under which the District Court ordered the subpoena to issue may be briefly stated as follows: Precision Recapping Equipment Company, the debtor, and two related corporations filed and had approved their application for reorganization under Chapter 10 of the Bankruptcy Act in the District Court for the Middle District of Georgia on February 15, 1961. The District Court appointed appellee trustee and ordered him to "investigate the acts, conduct, property, liabilities and finances and financial condition of said debtor, the operation of its properties and the desirability of continuance thereof, and any other matters relevant to the proceedings or the formulation of a plan . . ." Appellant Mattox was at that time and still is Vice President, a Director and a Stockholder of the debtor: he was also and still is a partner of Retreading Equipment Company, consisting of himself and his four sons, which has its principal place of business in Charlotte, North Carolina, where Mattox lives. Since October 1, 1953, Retreading had had a royalty contract and sales agency contract with the debtor, whereby it paid the debtor royalties for use of certain patents of the debtor and paid the debtor commissions for sales made by the debtor for it. The debtor had an obligation outstanding to Mattox on a promissory note in the approximate amount of one million two hundred thousand ($1,200,000.00) Dollars dated October 1, 1953, which Mattox had transferred to his partnership on or about October 1, 1953; at the time of the filing of the petition for reorganization the partnership was indebted to the debtor in the sum of $349,190.44. During the reorganization proceedings, both Mattox and the partnership filed objections

to certain proposals and one time objected to the entire reorganization proceedings. Cubbedge Snow, Esquire, of the Macon Bar was attorney of record for Mattox and Retreading during these proceedings and remained counsel of record at the time of the orders here complained of. During the pendency of the reorganization proceedings an auditor engaged by the Trustee made certain investigations of the books of Retreading at the place of business of Mattox in North Carolina, and he represented to the trial court that this investigation showed that Retreading was indebted to the debtor in an amount in excess of that shown on the books of the debtor corporation. He also represented to the trial court that his investigation indicated that Retreading and or Mattox may have failed to pay other sums that would be due to the debtor corporation under the existing contracts between these two parties. It was in this posture of affairs that appellee sought from the trial court the subpoena duces tecum which was subsequently issued. The trial court entered an order requiring that an order to show cause why such subpoena should not issue be served by mail on Mattox and Retreading and that it be served also on local counsel of record for these parties in the reorganization proceedings.

Appellant, without waiving his rights to contest the jurisdiction of the District Court for the Middle District of Georgia over him as a person and over his books moved to quash the notice of the order to show cause. This was set for hearing and argument was had and the motion was overruled by the trial court, which then issued the order here complained of.

We think it plain that under the circumstances the appellant was such a party to the pending proceedings in the reorganization court that he was subject to any orders of the court as would run against any party to the litigation.

We also think that the provisions of the Federal Rules of Civil Procedure which authorize the taking of a deposition outside of the territorial jurisdiction of the court in which litigation is pending and the rules providing for the method of service of the notice of taking such deposition and the issuance of a subpoena duces tecum under such circumstances are applicable in a situation such as that before the court.

The Court followed the procedure as suggested in Collier on Bankruptcy, 14th Edition, Volume 2, Pages 330-331, which seems to us to comport fully with the law and the rules.

The orders of the trial court are therefore AFFIRMED.